TITLE 326 AIR POLLUTION CONTROL BOARD

LSA Document #00-137

SUMMARY/RESPONSE TO COMMENTS FROM THE THIRD COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from April 1, 2001, through April 23, 2001, on IDEM's draft rule language. IDEM received comments from the following parties:

Citizens Thermal Energy	(CTE)
Alcoa Power Generating Corporation	(APGC)
Enron Corporation	(EC)
Purdue University	(PU)
BP Amoco Oil	(BP)
NiSource	(NS)
Cinergy Corporation	(CIN)
Clean Air Action Corporation	(CAAC)
Indiana Municipal Power Agency	(IMPA)
Indiana-Kentucky Electric Corporation	(IKEC)
Bethlehem Steel Corporation	(BSC)
Ispat Inland Incorporated	(III)
EnviroPower of Indiana	(EPI)
American Electric Power	(AEP)
Hoosier Environmental Council	(HEC)
Citizens Action Coalition of Indiana	(CACI)
Natural Resources Defense Council	(NRDC)
Save the Dunes Council	(SDC)
Save the Valley	(SV)
Sierra Club-Hoosier Chapter	(SCHC)
Valley Watch, Incorporated	(VWI)
John D. Smith	(JDS)
U.S. Steel Group	(USS)
Indiana Electric Utility Air Work Group	(IEUWG)
United States Environmental Protection Agency	(USEPA)
Tenaska Incorporated	(TI)
Hoosier Energy Rural Electric Cooperative, Incorporated	(HE)
Williams Energy	(WE)
State Line Energy, LLC	(STE)

Following is a summary of the comments received and IDEM's responses thereto:

General

Comment: It is in Indiana=s best interest to not have U.S. EPA impose a federal implementation plan. IDEM should continue to develop a NO_x rulemaking that adheres to the federal requirements, as they relate to any NO_x budget. (AGPC)

Response: IDEM agrees.

Comment: We are concerned about the process being used to finalize this rule, although we recognize IDEM=s legal requirement to publish the proposed rule that was preliminarily adopted. We question the practicality and purpose of the comment period, when IDEM has made clear that changes to the proposed rule will be made and this is not the rule that will be presented to the air pollution control board for final adoption. There is concern that comments on possible revisions are not afforded official comment status and not part of the official record. In addition, extremely tight comment deadlines and a rush to finalize the rule have important implications for issues of this complexity and magnitude. (NS) (IEUWG)

Response: IDEM has followed the requirements of state law regarding publication of the proposed rule and the third comment period. IDEM has also gone far beyond minimum legal requirements and provided many opportunities for informal comment on the rule. While informal comments are not considered Aofficial@ under the state rulemaking process, IDEM takes them just as seriously as if they were. IDEM will recommend a number of changes to the rule based on both formal and informal comments and in this Response to Comments document is providing answers to many of the informal comments submitted on the version of the rule IDEM circulated on March 29, 2001. For a rulemaking that involves as many issues as this one does, supplementing the official, legally required public comment periods with other opportunities for input and discussion is essential, and IDEM has used this approach in several of its more complex rulemakings.

Comment: There is concern about the uncertainty regarding the emissions budgeting process and budgets included in this rule. These budget uncertainties are a direct result of the court actions regarding the Aphased approach@ that U.S. EPA has instituted in response to the various court actions. (NS)

Response: IDEM is not sure what the commenter means by “uncertainty” in the budget. IDEM has worked closely with U.S. EPA and the regulated community to work through the various issues related to the emissions budgets. This work has resulted in the development of final budgets that have been settled for some time and provide certainty for the regulated sources. These budgets should not be affected by the Phase I and Phase II approach instituted by U.S. EPA.

Comment: IDEM should extend the rule development schedule to allow more time to reconsider and refine the concepts developed in the comments before preparing a final version of

the rule for final adoption. We believe the extremely tight deadlines have hindered the full evaluation and language development to incorporate some more innovative recommendations submitted previously, including comments on possible revisions to the rule. There has not been sufficient time to fully review the implications of possible changes to the rule. IDEM should republish a revised rule for public comment after all formal and informal comments have been received. (CIN) (NS) (IEUWG) (STE)

Response: The development and implementation of U.S. EPA=s NO_x reduction requirements have been under discussion among IDEM, affected sources, and the public since at least 1998. In the past 12 months, since the formal commencement of this rulemaking, IDEM has had over thirty meetings, conference calls or informational sessions with interested parties to discuss proposed concepts, rule language, and individual concerns. Although moving expeditiously because of federal deadlines, there has been ample opportunity for a full discussion of the issues. It is time to acknowledge that some of the more innovative recommendations urged by commenters will simply not be approved by U. S. EPA, even under the new Administration. Indiana should finalize its NO_x SIP Call rule.

Comment: IDEM should withdraw #98-235 (APCB). Recent actions by the U.S. Supreme Court has brought certainty regarding the NO_x SIP call rule. (NS)

Response: IDEM will withdraw #98-235 when this rulemaking is completed.

Comment: IDEM should allow for additional input and public review. Many major issues remain unresolved, but IDEM is proposing to only allow the Third Notice of Public Comment that only addresses the preliminarily adopted rule and not the rule that will reflect the resolution of these issues. Under Indiana law, the comment period is required for all changes that arise from comments before and during the preliminary adoption public hearing. Many of the issues brought up during the hearing have not been resolved and IDEM is still considering changes to the rule. This process may subject the entire rule to legal challenge and may require a new preliminary adoption. (IKEC) (IEUWG)

Response: IDEM has allowed for all of the formal rulemaking procedures, found in IC 13-14-9, to occur. In addition, IDEM held informal workgroup meetings with individuals affected by this rule. The formal rulemaking procedures are the only requirements by law and have been followed accordingly.

The purpose of the third comment period is to address changes between the Second Notice of Comment Period and preliminary adoption (IC 13-14-10-3) not, as the commenters suggest, all changes that may arise from comments made during the first hearing. The fact is that issues often arise during and after the first hearing that lead to the department suggesting further changes to the rule. Most often these changes are directly responsive to comments made by affected sources and the public. Revisions proposed during this time period are not required to go through a comment period. In this case, however, IDEM has made them available for informal review.

Comment: IDEM should delay any action on this rule until the major issues such as, the

Section 126 rule and the consideration of the AOhio Proposal@ have been fully resolved. (IKEC) (IEUWG)

Response: IDEM has discussed these issues on several occasions with U.S. EPA and Commissioner Kaplan submitted a formal request to the Acting Administrator for Air and Radiation about both the issues specifically mentioned as well as others. U.S. EPA has made clear in its response to IDEM=s letter and in other public arenas as well that the Ohio proposal is not approvable. With the May 15, 2001 court decision on the Section 126 rule and U.S. EPA=s response to IDEM on that issue, IDEM believes that this issue is sufficiently resolved for Indiana=s rule to move forward to final adoption.

Comment: IDEM should include language that would allow for flexible and voluntary reductions from non-budget sources. Allowances would be allocated for verifiable, quantifiable, and enforceable reductions that would then be transferred to the trading budget. This will encourage greater opportunities for emissions reductions. (CIN) (CAAC)

Response: IDEM will continue to discuss flexible and cost-effective approaches to NO_x control, which can be quantified, verified and assured through enforceable mechanisms. Such measures, if proposed, can be amended into Indiana=s rule and SIP and may provide a mechanism to increase the trading budget. The type of general language that has been suggested by commenters is not sufficiently specific for purposes of this rule, however.

Comment: IDEM should slow down the rulemaking process. We are not aware of any sanctions that would be taken if IDEM delays the rulemaking for one to two (1-2) months. It is unlikely that U.S. EPA will issue a federal implementation plan unless it looks like IDEM will not adopt a rule implementing the SIP call by May 2004. While U.S. EPA has started a Asanctions clock@, IDEM has over a year to complete the rulemaking. The need to finalize the Chicago area nonattainment plan is not sufficient justification for pushing the rule through without adequate comment. If IDEM has any documents that demonstrate that U.S. EPA will impose sanctions on the state if the rule is not completed by the end of May, we request that these documents be made available to the public. (AEP) (IEUWG) (STE)

Response: U.S. EPA=s letter to Commissioner Kaplan of May 3, 2001, which has been made available to interested parties, explains that agency=s legal requirements for completing approval of an Indiana NO_x SIP call rule. IDEM can provide a copy of the federal Consent Decree between U.S. EPA and the Natural Resources Defense Council that establishes these deadlines upon request. Moreover, as noted above, there has been substantial time devoted to discussions on this rule.

Comment: The Third Notice of Comment Period plays a vital role in the consideration and adoption of amendments to the preliminarily adopted rule. The air pollution control board may finally adopt a rule that includes such amendments only if they are a logical outgrowth of the proposed rule and comments received at final adoption. Amendments incorporated in the final rule are a logical outgrowth of the proposed rule and comments at the final adoption only if the

notice and comments Afairly appraise interested persons of the specific subjects and issues contained in the amendment.@ We do not believe that publication of a draft rule that may be superceded is a fair notice and may be a violation of due process. (IEUWG)

Response: According to IC 13-14-9-10, the board may adopt an amended rule if the language is a logical outgrowth of the preliminarily adopted rule and comments. A logical outgrowth, as noted, is based on the language of the proposed rule and any comments. The logical outgrowth is also based on whether the interested parties were allowed adequate opportunity to be heard by the board.

In this instance, the revisions that IDEM will recommend to the Board are logical outgrowths of the proposed rule, comments from interested parties in the formal comment periods, informal comments received at workgroups and at the request of IDEM, and comments from the U.S. EPA. All of these will be raised before the Board so an adequate opportunity will be afforded to those who wish to discuss further changes.

This process is not a violation of due process. All interested parties have had formal and informal opportunities to review the rule and proposed revisions. They will have a final formal opportunity at the Board meeting on June 6. All of the basic issues were raised and discussed long before the proposed rule was published. Revisions discussed recently are variations and refinements of these basic issues.

Comment: IDEM should include a mandatory Areopener@ provision in the rule that mandates that if U.S. EPA modifies the NO_x SIP call to make it more flexible, then IDEM shall reopen the rule to incorporate the increased flexibility. (IEUWG)

Response: IDEM does not believe that a mandatory reopener is appropriate to include in this rule. Although there are absolutely no indications that U.S. EPA intends to make revisions to the NO_x SIP Call, if there were at some time in the future, IDEM would undertake rule revisions on its own initiative, or interested parties could petition the Board for the rule to be amended pursuant to IC 13-14-8-5.

Comment: U.S. EPA made some changes in developing 40 CFR 97 that improved upon the model rule making the program requirements more comprehensible and in many case more flexible. U.S. EPA is encouraging states to make these changes in their rules and believes some changes must be made to allow for trading between the sources under the SIP call and Section 126. The changes also reflect recent revisions to 40 CFR 75. A table is available that lists all of the changes. (USEPA)

Response: IDEM will recommend revisions to the rule consistent with changes in the federal rules.

Comment: BP Amoco has entered into a Consent Decree with U.S. EPA that will require significant NO_x reductions. These reductions have not been factored into the NO_x SIP call budgets. These reductions will be realized by 2004 and IDEM should increase the allowance allocation for BP Amoco commensurate with these reductions. (BP)

Response: The rule as structured does not permit IDEM to increase any individual source=s allowance allocation based on reductions made at facilities not covered by the rule, whether those reductions are voluntary or, as in this case, required by a Consent Decree or other legal requirement. The opt-in provisions of the rule are intended to allow sources making reductions at other facilities to join the trading program and obtain flexibility through allowances generated by those reductions. IDEM realizes that under BP Amoco=s particular circumstances, the opt-in program would not give Amoco full credit for the Consent Decree reductions.

326 IAC 10-3 - Cement kilns

Comment: Indiana must provide documentation that the Louisville area remains in attainment without the requirements of 326 IAC 10-1 or demonstrate that there are less NO_x emissions and the risk of extreme daily and monthly emissions is minimal. For the second demonstration, any kilns in the area could not opt into the trading program. (USEPA)

Response: The 326 IAC 10-3 limits for the 326 IAC 10-1 applicable kilns are forty-seven percent to sixty-four percent (47% to 64%) on a daily basis and eighty-five percent (85%) on a thirty (30) day rolling average basis of the 326 IAC 10-1 limits, therefore, the probability of these kilns exceeding 326 IAC 10-1 emission levels, if complying with 326 IAC 10-3, is minimal, even on a daily basis. Also, if a source chose to opt into the trading program, it would emit at or below its 326 IAC 10-3 requirements. Therefore, opt-in for such kilns would not cause emissions to exceed 326 IAC 10-3 and hence 326 IAC 10-1 levels.

Comment: A definition of clinker should be included in 326 IAC 10-3-2. (USEPA)
Response: IDEM will include a definition of clinker.

Comment: For the emission limits under 326 IAC 10-3-3(a)(2) and reduction requirements under 326 IAC 10-3-3(a)(3), IDEM should require compliance based on a thirty (30) day rolling average. Kiln emissions are highly variable and short-term testing is not appropriate. In addition, any baseline should be established using CEMs and a thirty (30) day average and this should be reflected in 326 IAC 10-3-3(c)(2). (USEPA)

Response: IDEM believes the rule should mirror the averaging period for the federal trading program that is an ozone control period average. IDEM does not believe it is appropriate to use CEMs data from 2002 to establish a baseline and that it should be based on historical data. Many sources may have already installed control measures to comply with the rule by this date. The SIP call was developed looking at a 1995 baseline that was projected to 2007 and IDEM believes the historical data should be used to establish a unit's baseline. IDEM also believes that industry average emission rates should be used for the establishment of the baseline.

Comment: The following comments are offered concerning the requirements under 326 IAC 10-3-4:

- If a kiln is already operating a CEMs, it should be required to continue to operate and maintain the CEMs. A CEMs is also required for kilns complying with 326 IAC 10-3-3(a)(2)

or 3(a)(3) and those complying with 326 IAC 10-3-3(a)(1) should use the CEMs for seasonal reporting.

- Kilns that are complying with 326 IAC 10-3-3(a)(1) that do not have CEMs are not required to perform annual testing.
- If a kiln is complying with the limits in 326 IAC 10-3-3(a)(2), an averaging time of at most thirty (30) days needs to be developed, along with a testing program consistent with this approach. The program could be based on CEMs or parameter monitoring.
- A kiln complying with 326 IAC 10-3-3(a)(2) needs to establish a baseline with CEMs and should be required to install the CEMs no later than May 1, 2002. (USEPA)

Response: IDEM agrees that where a CEMs is already in operation and the unit is complying with 326 IAC 10-3-3(a)(2) or 3(a)(3), CEMs are appropriate for demonstrating compliance. IDEM also agrees that kilns complying with a control technology requirement should not be required to conduct annual stack testing. IDEM does not agree that a thirty (30) day average is appropriate and that an ozone control period average is appropriate for the purposes of this rule. This approach is consistent with the NO_x SIP call target of ozone season reductions. However, IDEM does agree that additional language is needed to address enforcement issues with an ozone control period average and has included such language under 326 IAC 10-3-6. IDEM does not agree that a CEMs is required to establish a baseline and requiring a CEMs established baseline in 2002 could penalize units where controls have already been installed.

Comment: The following comments are offered concerning the requirements under 326 IAC 10-3-5:

- It is recommended that kilns complying with 326 IAC 10-3-3(a)(1) report results of performance testing and daily cement production. However, since these are technology requirements, U.S. EPA can consider approval of a rule that does not require the test reporting requirements.
- Kilns complying with an emission limit on a pound of NO_x per ton of clinker will need to keep production records to ensure compliance on at least a thirty (30) day rolling average.
- Kilns using CEMs should determine compliance based on CEMs data and kilns not using CEMs should establish an emission rate based on average industry emission factors, site specific emission factors developed from testing, or an approved alternative emission factor. (USEPA)

Response: IDEM agrees, except that compliance on a thirty (30) day rolling average is not needed and an ozone control period average should be used.

<u>Section 126 Rule</u>

Comment: There are concerns about the interaction between this rule and the Section 126 rule. It is impossible for IDEM to develop an appropriate interpretation of the interaction between the two rules until the litigation of the Section 126 rule has been completed. (NS) (IEUWG)

Comment: It is virtually certain that there will be some differences between the Section 126

program and a program under this rulemaking. While Cinergy appreciates IDEM's continued discussions with U.S. EPA to find a resolution, sources subject to the Section 126 rule should be exempt from this rulemaking. (CIN)

Comment: IDEM should continue to work with U.S. EPA to address issues related to the Section 126 rule. If the Section 126 rule cannot be eliminated, IDEM should work with U.S. EPA to make the Section 126 rule consistent with the Indiana rule, especially the twenty-five (25) ton exemption and the allowance allocations. (IMPA)

Comment: A final rule should not be presented to the air pollution control board until the litigation concerning the Section 126 rule has been resolved. Rushing forward will potentially place sources in Indiana at a disadvantage in the future should this rule prove incompatible with the Court ruling. Additional rulemaking could be done to correct discrepancies, but state and federal action would be required before the changes are operable. (IMPA) (CIN) (AEP) (STE)

Comment: The language concerning Section 126 sources should be withdrawn. We do not believe that any transition language suggested by U.S. EPA would be sufficient prior to the Court ruling on the litigation. The language under 40 CFR 52.34(i) states that the Section 126 rule will be withdrawn once U.S. EPA approves a SIP rule, so the language concerning the Section 126 sources is not needed in Indiana's rule. IDEM should encourage U.S. EPA to follow the plain reading of 40 CFR 52.34(i). (AEP)

Comment: IEUWG strongly opposes IDEM's proposal concerning Section 126 sources. IDEM has no authority to unilaterally withdraw a federal rule and the result would be sources being subject to two (2) rules simultaneously. In addition, the language would make Section 126 sources subject to the state rule a full month before that rule would otherwise be applicable, even though the compliance date for the Section 126 rule is still under litigation. Even if the Section 126 rule is upheld, it is still possible that U.S. EPA would find a SIP call rule with a May 31, 2004 compliance date to be sufficient and withdraw the Section 126 rule. IDEM should resolve this matter before including requirements for Section 126 sources prior to the May 31, 2004 deadline. (IEUWG)

Response: IDEM recognizes that the interaction between the NOx SIP Call and USEPA's Section 126 rule is critical for those sources subject to both programs. The two rules require essentially the same relief, but there are certain differences between the federal and state programs that would make simultaneous compliance with both rules problematic. Most notable is the compliance date—May 1, 2003 for Section 126 and May 31, 2004 for Indiana's NOx rule. There are five (5) utilities with twenty-five (25) units in Indiana subject to both programs. IDEM does not believe, however, that delaying final action on this rule is either necessary or appropriate.

U.S. EPA, Indiana and the affected utilities all believe that the sources should be subject to only one of these rules. Indiana strongly believes, and USEPA agrees, that Indiana's NO_x program should subsume the Section 126 program as soon as it is in place and effective. To have some sources in Indiana subject to Section 126 and others subject to the NO_x SIP Call would make implementation needlessly complicated. Given the basic similarities between the programs and that U.S. EPA's budget trading program is the mechanism used to implement both rules, the

transition from compliance with Section 126 in 2003 to Indiana's rule in 2004 will be a smooth one. U.S. EPA's letter to Commissioner Kaplan dated May 3, 2001, states clearly that it will proceed with rulemaking to remove the Indiana sources from the Section 126 rule. It also confirms U.S. EPA's view that sources can transition from compliance with Section 126 to the Indiana rule without it affecting their banked allowances and that early reduction credits earned under Section 126 may be used for compliance with the Indiana rule. In fact, by transitioning to the Indiana rule, sources subject to Section 126 get the advantage of a third year to use early reduction credits.

Two (2) separate legal requirements compel Indiana to move forward with this rulemaking. First, in its decision upholding the U.S. EPA's NO_x SIP Call, the court gave states until October 2000 to complete their rules. Missing the federal deadline means that U.S. EPA could finalize a federal NO_x rule at any point, depriving Indiana citizens and sources of the advantages of a rule tailored specifically to the needs of this state. Some of the features IDEM has developed for the rule in cooperation with interested parties include the three (3) year allocation methodology (as opposed to the annual allocations in the EPA model rule) and the energy efficiency/renewable energy set aside. These features would not be included in a federally imposed NO_x rule. Second, Indiana's ozone attainment plan for Lake and Porter Counties, which is also past its federal submittal deadline, relies on regional NO_x reductions as a key component. U.S. EPA is subject to a court approved Consent Decree requiring it to propose a federal ozone control plan for this area by October 15, 2001 if it has not approved a state attainment plan, and to finalize that federal control plan six months later if a state plan still has not been approved. A key element of the federal plan would be U.S. EPA's NO_x program.

Commenters urge IDEM to postpone adoption of its rule until the D.C. Circuit Court of Appeals issues its decision on the legal challenge brought against the Section 126 rule. That decision was issued on May 15, 2001 and it upheld the Section 126 rule on issues relevant to this rulemaking, including the compliance date of May 1, 2003.

Permitting Issues

Comment: IDEM should include a pollution control project exclusion in 326 IAC 2-3 similar to what has been included under 326 IAC 2-2. Without a broad exclusion in the rule, permitting of pollution control projects will become more burdensome and project schedules may be affected. U.S. EPA has proposed changes to federal rules and has issued a policy guidance that IDEM could use as the basis of the changes and to provide adequate safeguards. (BP) (USS)

Comment: IDEM should follow the lead of other states in Region V and provide clarification that all NO_x control equipment and associated modifications that are necessary to comply with this rule are environmentally beneficial and exempt from applicable regulations. (CIN)

Comment: If IDEM includes language concerning permitting requirements to grant some

relief for pollution control projects, a formal comment period on any such language should be provided prior to final adoption. IDEM should also consider language that would rely on a test of environmental benefit. (AEP)

Comment: IDEM should include a pollution control project exclusion from permitting requirements and including the following specific recommendations:

- IDEM should confirm that a source does not need a determination or other form of approval from the department to implement the exclusion.
- A definition for pollution control project should specifically name the types of NO_x controls that will typically be employed in meeting the SIP call requirements. This has been done previously at 326 IAC 2-1.1-1(13).
- IDEM should confirm that the pollution control project exclusion will extend not only to installation of the pollution control equipment, but also to other changes that are needed to accommodate the new equipment.
- The rule should provide that certain pollution control projects are presumptively environmentally beneficial. U.S. EPA has done this in its July 1, 1994 guidance document concerning pollution control project exclusions.
- IDEM should confirm that, if a pollution control project results in a significant net emissions increase of a regulated pollutant, dispersion modeling is not always needed in order to determine that the increase will not cause or contribute to the exceedance of a National Ambient Air Quality Standard (NAAQS), increment, or air quality related value. This would avoid the expenditure of time and resources in conducting dispersion modeling that is not needed to verify that air quality will not be adversely affected by a pollution control project. (IEUWG)

Response: IDEM agrees that a pollution control project exclusion is appropriate and has included a pollution control project exclusion in the Emission Offset rule in 326 IAC 2-3 that is consistent with the federal rule in 40 CFR 51.165, the US EPA guidance "Pollution Control Projects and New Source Review Applicability" (July 1, 1994), and the proposed changes to the new source review rules from the July 23, 1996 Federal Register (61 FR 38249) that are consistent with the current US EPA guidance. IDEM had previously included a pollution control project exclusion in the Prevention of Significant Deterioration rule in 326 IAC 2-2.

While the federal rule in 40 CFR 51.165 does not extend the exclusion to source categories other than electric utility steam generating units, the US EPA guidance does allow such an exclusion upon a case-by-case review. Therefore, IDEM has extended the pollution control project exclusion for major new source review to all source categories. The pollution control project exclusion includes language that relies on a test of environmental benefit and considers other air quality concerns such as air quality impacts and increment consumption. The purpose of including the exclusion in our rule will be to allow IDEM to implement the federal rule provisions and US EPA guidance.

A source needs an approval from the department in the form of a significant source modification in accordance with 326 IAC 2-7-10.5(f)(8) for the pollution control project exclusion. This is a minor new source review process that will allow IDEM to implement the

rule and US EPA guidance and that will provide an opportunity for public comment and US EPA comment, as required by the US EPA guidance. Since the sources that need to use this exclusion are those sources proposing projects that result in a significant increase in emissions, this review is required by US EPA's policy. These projects are not required to undergo major new source review if they qualify. IDEM does not believe that the safeguards provided in the exclusion can be effectively implemented without minor new source review to determine if the pollution control project is environmentally beneficial or if modeling is necessary to confirm that the project will not cause or contribute to a violation of the NAAQS or PSD increment, or adversely affect an air quality related value in a Class I area. In addition, the US EPA did not exclude utilities from minor new source review, only major new source review.

IDEM understands that sources would like more clarification regarding permitting for the pollution control projects and other types of changes that sources must make to comply with the NO_x SIP Call. However, the pollution control project exclusion is a case-by-case exclusion and cannot be broadly generalized. The letter from the Ohio Environmental Protection Agency (EPA) that the commentor submitted did not state that all NO_x control equipment and associated modifications that are necessary to comply with the NO_x SIP Call rule are environmentally beneficial and exempt from applicable regulations. The letter addressed two sources that submitted a specific request for a determination on whether or not the selective catalytic reduction (SCR) equipment that was proposed for emissions units at those sources would be exempt from the requirement to get a permit to install in Ohio. The letter did not address any associated modifications to the emissions units, if any were proposed.

The NO_x SIP Call rule does not prescribe what sources must do to comply, and affected sources are located in all parts of the state, including areas that are classified as attainment and nonattainment for different pollutants. Therefore, IDEM cannot anticipate all the site-specific changes that sources will need or elect to implement to accommodate the new pollution control equipment or comply with the rule and, as a result, cannot make blanket statements regarding permitting requirements.

IDEM is writing a Nonrule Policy Document (NPD) to address the concerns sources have regarding how we will implement pollution control project exclusion provisions. IDEM has revised the definition of "pollution control project" to be consistent with 40 CFR 51.165 and the US EPA guidance. The control technologies listed in the guidance as presumptively environmentally beneficial are included. The NPD will indicate that IDEM agrees that the pollution control projects listed in the US EPA guidance will be considered presumptively environmentally beneficial as long as they are otherwise eligible to be considered for the exclusion. The NPD will also express that IDEM agrees that dispersion modeling is not always needed in order to determine that the increase will not cause or contribute to the exceedance of a National Ambient Air Quality Standard (NAAQS), increment, or air quality related value. IDEM can conduct screening-level analyses that are conservative estimates of the air quality without requiring dispersion modeling from the source. However, IDEM reserves the authority to request a dispersion modeling analysis if IDEM has reason to believe that the increase will cause or contribute to a violation of a NAAQS or PSD increment or adversely affect an air

quality related value in a Class I area.

IDEM was responsive to commenters at the Air Pollution Control Board (APCB) meeting for preliminary adoption and included a pollution control project exclusion consistent with the federal rule in the March 29, 2001 version of the rule that was distributed to the NO_x work group. IDEM wrote a letter to the U.S. EPA Headquarters requesting clarification on the implementation of the pollution control project exclusion with respect to pollution control projects implemented to comply with the NO_x SIP Call. In addition, based on comments received during the third comment period, IDEM discussed the possibility of extending the pollution control project exclusion to source categories other than electric utility steam generating units with U.S. EPA Region V. IDEM revised the exclusion based on the comments that were received during the third comment period and is providing the revised exclusion in the packet for the June 6, 2001 APCB meeting. Therefore, the exclusion was included based on formal and informal comments and was written in accordance with the federal rule and the U.S. EPA guidance. The APCB meeting on June 6, 2001 will include an opportunity for a formal hearing on the pollution control project exclusion provisions.

Comment: IDEM should include the provisions of the NO_x waiver under Section 182(f) of the Clean Air Act. In addition, IDEM should discuss potential changes to the offset rules concerning volatile organic compounds (VOCs). Because the NO_x SIP call results in attainment of the ozone standard, additional offsets are not needed. At a minimum, IDEM could pursue revising its policy of not including contemporaneous decreases in the netting provisions in severe nonattainment areas. (III) (USS)

Response: The rule does implement the provisions of the NO_x waiver under Section 182(f) of the Clean Air Act (CAA) with respect to new source review of NO_x emitting sources, however, the VOC offset rules are beyond the scope of this rulemaking. The offset requirements and de minimis provisions are required by Sections 173 and 182 of the CAA for areas classified as serious or severe nonattainment; therefore those provisions cannot be removed from our rule. If the area is redesignated for ozone attainment or if the area is designated marginal or moderate nonattainment, then the additional offsets and de minimis provisions may not be required.

Comment: The language under 326 IAC 10-4-7(b)(1)(A) and (B) are unclear as to when a permit application is due. The language should be revised to clarify exactly when an application is due. (USEPA)

Response: IDEM agrees and has revised the language to be clear that applications are due 270 days before May 30, 2004 or 270 days before a source expects to begin operating.

<u>Applicability</u>

Comment: IDEM has maintained that the Perry K units are large affected units rather than small electric generating units based on having a firm contract for sale of electricity to the grid.

There are two (2) electric turbines at Perry K that have generated electricity that is distributed to the electric grid. The units at Perry K did not need a firm contract for sale to the grid, because the units were part of a "pool" of electricity generated by Indianapolis Power and Light and distributed to the grid. With the sale of Perry K to Citizens Gas and Coke Utility, there is now a contractual agreement in place. (CTE)

Response: IDEM understands the situation when the Perry K units were owned by Indianapolis Power and Light. It is IDEM's interpretation that when applying the definition of "large affected unit" to the Perry K units, these units meet that definition.

Comment: IDEM should exempt blast furnace gas units from the trading program. If IDEM exempts units that use blast furnace gas (BFG) as fuel from the trading program, the following points should be included:

- The rule language should clearly state that continuous emission monitors (CEMs) are not required to demonstrate compliance.
- Flexibility should be provided when no BFG is available, if IDEM would include fuel restrictions and an emission rate. During periods of blast furnace re-line, BFG is not generated.
- The rule should clearly state that any requirements apply as an ozone season average and over all commonly owned units.
- A definition of "blast furnace gas fired" should be included.
- The rule should allow the use of standard emission factors for fuels where such factors exist.
- The rule should provide that site specific compliance plans would be the basis for reporting compliance.

IDEM should also allow the BFG units to elect to be in the trading program if they elect to and comply with the monitoring. The trading budget could be revised for the select units and unused credits could be traded to lower compliance costs. Key to this proposal is revising the rule to delete the "baseline emission rate" provisions. (BSC) (III) (USS)

Response: IDEM has revised the rule to exclude the BFG units from the trading program. However IDEM cannot allow BFG sources to simply to elect to be in the trading program without requiring formal rule changes, unless the units opt-in following the procedures in the rule.

Comment: If BFG are exempted from the trading program, IDEM should base the applicability on firing greater than fifty percent (50%) during the ozone control period prior to the allocation date and should not include a list of specific sources or units. This would address periods where the source switches to another fuel for an extended period of time. (III)

Comment: If IDEM chooses to exempt BFG units from the trading program and include specific requirements, then the rule should be clear on which rule the units would be subject to, including new units. In addition, the rule should not apply during startup and shutdown. (III) (USS)

Response: IDEM has included language that would require new BFG units to be subject to

326 IAC 10-3 and not the trading program and has excluded startup and shutdown times. IDEM has included a specific list of existing units that would be subject to the rule. If affected units were not specified, a unit could be subject to 326 IAC 10-4 in the future based on fuel usage and would require a readjustment of the trading budget and possibly NO_x allowance allocations.

25 ton exemption

Comment: IDEM should continue to work to expand the language and make the exemption as broadly-worded as possible. This will allow the rule to focus on more significant NO_x sources and remove unnecessary burdens from sources with comparatively low emissions. (IMPA)

Comment: The changes made to this language for preliminary adoption are supported. IDEM is encouraged to go farther and expand the exemption. Language under 40 CFR 75.19 allows a source to make a showing that the values in 40 CFR 75.19, Table 2 are inappropriate and to develop a more representative value. IDEM should adopt this provision as well as allowing a source that has a federally enforceable limit less than the values in Table 2 to use those limits. (AEP)

Response: IDEM has made further changes. The final language must be acceptable to U.S. EPA, however, and IDEM may not be able to accommodate all the changes requested by commenters.

Comment: IDEM should not reduce the trading budget for units that qualify for the exemption, but are not in the trading budget and not allocated allowances. It is not equitable for sources in the budget to lose these allowances. This would not impact ozone levels and will make for a smoother operating program. (AEP)

Response: As indicated in U.S. EPA comments, the trading program budgets must be adjusted to account for the potential emissions from these units. By not doing so, IDEM could jeopardize the trading program and federal approval.

Comment: U.S. EPA has the following comments concerning the twenty-five (25) ton exemption language:

- The language should refer to the defaults under 40 CFR 75.19, Table 2.
- The language referring to CEMs should be clarified to require that the CEMs is operated according to 40 CFR 75, Subpart H and 326 IAC 10-4-12.
- The language concerning limiting fuel usage should be revised to simply require that the unit's fuel usage during the ozone control period will be multiplied by the default emission rates and summed to determine compliance with the twenty-five (25) ton limit.
- The rule must include language that subtracts the unit's potential tons of emissions from the trading budget. Language must be included that deducts these tons from units that have been allocated allowances and deducts these tons from the new unit set-aside for new units that are exempted. Example language can be found under 40 CFR 97.4(b)(4), 40 CFR 97.40, and 40 CFR 97.42(d)(5)(ii)(B). (USEPA)

Response: IDEM has incorporated these changes.

Definitions

Comment: The definition of "Energy efficiency and renewable energy projects" should be expanded to include projects implemented at large affected units that would decrease the heat input to make steam or other energy saving projects. (CTE) (AGPC)

Response: IDEM has revised the definition and revised the allocation procedures to expand the types of projects that are included.

Comment: The language under the definition of "Percent monitor data availability" should be revised to reflect units that may not operate during the entire ozone control period. The reference to three thousand six hundred seventy-two (3,672) should be revised to "total operating hours during the ozone control period." (CTE)

Response: IDEM has consulted with U.S. EPA and has revised the definition to reflect actual operating hours.

Comment: The term "permanent record" in the definition of continuous emission monitoring system should be clarified so it is not construed as a requirement for permanent retention. (NS)

Response: IDEM does not believe that a clarification is necessary, because the rule language specifies required retention periods, not the definition.

Comment: The definition of "emissions" is too broad and should be narrowed to only NO_x emissions. (NS)

Response: IDEM agrees that the purpose of this rule is to reduce NO_x emissions, although U.S. EPA has indicated that within the body of the rule, the only reference to emissions is NO_x emissions. The language has been revised to narrow the definition to avoid any confusion.

Comment: If IDEM would include thresholds to further define "highly efficient" generation, the agency should make sure that any references to generating systems refers back to the types of systems included in the definition. (NS)

Response: IDEM has revised the definition to specify the types of systems and associated thresholds.

Comment: The term "retired" should be deleted under 326 IAC 10-4-2(17)(D). The term could discourage installation and use of highly efficient generation on a seasonal basis, an evaluation period, or transition period. (NS)

Response: The intent of this language is to permanently retire older, less efficient generation and replace it with more efficient generation. There is a concern that deleting the term could allow for increases in NO_x emissions from new units, albeit highly efficient units, while the unit that is meant to be replaced does not have any restrictions on emissions.

Comment: It is not clear that there is a need for a definition of or reference to "NO_x budget source." It appears to require controls and reductions on units not required to make reductions for purposes of the NO_x SIP call. (NS)

Response: Included with the rule are permitting requirements associated with Title V and federally enforceable state operating permit programs. In both of these programs, permits are issued to the "source" and any units at the source are included in the permit. Therefore, a source that includes a NO_x budget unit is considered to be a NO_x budget source. Because the requirements for allocations or deductions are unit-specific, IDEM does not believe the rule requires any controls or reductions from any non-NO_x budget unit.

Comment: The definition of "ton or tonnage" needs to be clarified. Five-tenths is not equal to 0.50 for regulatory purposes. 0.50 should be changed to 0.5. (NS)

Response: IDEM agrees that the language should be revised. However, since the definition addresses rounding and significant figures, IDEM is revising five-tenths to fifty-hundredths.

Comment: The definition of "maximum design heat input" should be revised to delete the phrase "and the federally enforceable permit conditions limiting the heat input." This expansion of the definition is unacceptable and could allow units that would otherwise be subject to be exempt. This could also allow sources to shift loads from one unit to another and increase emissions. (USEPA)

Response: IDEM has deleted the phrase.

<u>Retired unit exemption</u>

Comment: The language under 326 IAC 10-4-3(e)(7) should be revised in the case that a retired unit is sold or no personnel are located at the site. In this instance, the company should be able to have records located elsewhere within the state, or possibly with no restrictions on location, as long as the records are made available with a reasonable time (3 business days). This should also be allowed under the Standard requirements at 326 IAC 10-4-4(e)(1). (NS) (AEP) (IEUWG)

Response: IDEM has revised the rule to allow centralized storage within Indiana for sources that are unattended.

Comment: It is not clear whether a retired unit would receive a full allocation under 326 IAC 10-4-9 if they only operate for two (2) full ozone control periods. It is suggested that the rule language be revised to allow a unit with only one (1) year of operation to be eligible to receive a full allocations. This will promote units to retire earlier. (CIN)

Response: It is IDEM's interpretation that a unit that has operated at least one (1) year within the time period for which heat input is determined for allowance allocation, the unit would receive an allocation. IDEM has revised the rule to clarify this issue for retired units as well as

new units.

Standard requirements

Comment: The language under 326 IAC 10-4-4(c)(1) referring to "plus any amount necessary to account for actual utilization" should be deleted. It appears to double charge for emissions. (NS)

Response: IDEM disagrees that the language would lead to double charging for emissions. The deduction for actual utilization is based on a specific emission rate or allowable emissions, not the actual emission rate. However, IDEM does agree that deductions should be for actual emissions and has deleted the phrase throughout the rule.

Comment: There is a question of legality of the language under 326 IAC 10-4-4(c)(6) referring to "no provision of law shall be construed to limit the authority." It appears that this is an attempt to limit the applicability of due process to persons or parties affected by this rule. (NS)

Response: U.S. EPA must have the ability to deduct allowances for excess emissions and to discount allowances under the flow control provisions. Without this language, a claim may be made that U.S. EPA does not have the authority to make these deductions.

Allowance Allocation Methodology

Comment: IDEM should choose an allocation methodology for the large affected units quickly. IDEM has requested and received comments concerning preferred alternatives, but the agency has not yet selected any alternatives. Without specific language, sources cannot provide specific comments. Because of the delay, IDEM should move the rulemaking to the June, 2001 air pollution control board meeting. (CTE)

Comment: The allocation methodology for large affected units should be revised. The rule should allocate allowances based on a sixty percent (60%) reduction from current emissions, not an arbitrary seventeen hundredths pound of NO_x per million British thermal units (0.17 lb/mmBtu). The exception would be if a sixty percent (60%) reduction would result in an emission rate below seventeen-hundredths (0.17) lb/mmBtu. This more accurately reflects the intent of the SIP call rule. (APGC) (CTE)

Comment: IDEM should retain the current allocation methodology. The costs of installing controls on the boiler at Purdue could range from fifteen to sixty thousand dollars per ton of NO_x ($15,000 - $60,000/ton) reduced. Purdue also has concerns about NO_x credits being available for purchase even at two thousand dollars per ton ($2,000/ton). (PU)

Response: IDEM has sought and received thoughts and comments from the owners/operators of the large affected units. Several allocation methodologies have been under discussion and IDEM identified its recommended approach with affected industries. IDEM believes this

approach will lessen costs overall to affected sources and represents a good balance among the diverse needs of the sources.

Comment: IDEM should include incentives for energy efficiency in the allocation methodology. Since many of these projects will be new with lower permit limits, the language should be changed to allow the allocations to be based on fifteen-hundredths (0.15) lb/mmBtu rather than the permitted rate. To be eligible for the higher allocation emission rate, natural gas fired units would have to have an efficiency of at least forty percent (40%) and the target for combined heat and power would be fifty-five percent (55%). Definitions would be needed for terms such as "rated generating efficiency" or "overall rated generating efficiency". Rated generating efficiency would be the seasonal design gross efficiency using the lower heating value of the fuel. Overall rated generating efficiency would be the seasonal design gross efficiency of the electric and steam generating unit using the lower heating value of the fuel and incorporating the full energy value of the supplied steam and hot water. (NS)

Comment: IDEM should retain the language that would allocate allowances based on the more stringent of fifteen-hundredths (0.15) lb/mmBtu or the allowable emission rate. This method assures that the units that need the allocations receive them. IDEM should not revise the rule to allow exceptions for high efficiency units. This is an inappropriate mix of energy policy with a rule that focuses on emission reductions. (IKEC)

Response: Since preliminary adoption of the NOx SIP Call rule, IDEM has included additional incentives and thresholds developed in cooperation with the Indiana Department of Commerce, Energy Policy Division. A definition of "rated energy efficiency" has been added to the rule and IDEM has retained the language that would allocate allowances based on the more stringent of fifteen hundredths (0.15) pounds per million Btu or the allowable emissions rate with some exceptions to encourage generating efficiency.

Comment: IDEM should revise 326 IAC 10-4-9(f) to deduct allowances based on actual emissions and not actual utilization. Using actual utilization could lead to allowances being over-counted and not available for other units. (NS)

Response: IDEM agrees and has revised the rule language in 326 IAC 10-4-9(f) and elsewhere to require deductions for actual emissions.

Comment: IDEM should allocate allowances for a longer time period than three (3) years. A longer time period will allow better planning for long lead time installations of controls and the purchasing of future streams of allowances to ensure compliance. New sources can install controls more cost-effectively and do not need the lead time to retrofit units with control devices. There is also concern that market forces will increase the price of allowances to cover the increased volatility and risk associated with short-term allocations. (CIN)

Comment: IDEM is encouraged to revise the rule to a five (5) year allocation and any allocation shorter than the current language is opposed. Comments have been previously submitted to address new unit set-aside issues with a longer time frame. (AEP)

Comment: The current language concerning a three (3) year allocation, three (3) years in advance is supported. This allocation schedule provides some stability for compliance planning that will help stimulate trading market development. (CTE)

Comment: The rule should be revised to allocate allowances annually, three (3) years in advance. (EPI) (TI)

Response: IDEM believes that allocations for three (3) years, determined three (3) years in advance is a good compromise between the concerns of existing sources and new sources. Three (3) years is about the lead time required to install control equipment if needed.

Comment: The current rule language does not provide adequate public review for allocations of future allowances after the initial allocation period. IDEM should revise 326 IAC 10-4-9(b) to require adequate public review of future allocations. (CIN)

Request: IDEM agrees that there should be a public process for future allocations. IDEM has revised the language to incorporate language similar to that under the Section 126 rule that provides for public comment, but would limit the comment to whether or not the rule was applied correctly.

Comment: The language concerning allocations based on an allowable emission rate should be clarified. The language should include "as of the date that the unit becomes affected by this rule." This phrase will eliminate any allowance penalty for subsequent NO_x control programs. (CIN) (IEUWG) (STE)

Request: IDEM agrees and has revised the language where needed.

Comment: The language concerning timing of allocations under 326 IAC 10-4-9(b)(1) must be revised. The unit-by-unit allocations for 2004 must be included with Indiana's SIP submittal. (USEPA)

Response: Within thirty (30) days of the effective date of this rule, which is expected to be later this year, IDEM will submit to U.S. EPA the unit by unit allocations according to the methodology contained in the rule for EGUs and the unit by unit allocations are included in the rule for nonEGUs. A copy of the 2004 allocations will be included with IDEM's SIP submittal.

<u>Energy Efficiency and Renewable Energy (EE/RE) Set-Aside</u>

Comment: Any unused allowances from the EE/RE set-aside should be returned to existing large affected units on a pro rata basis. The allowances for the set-aside were taken from the large affected unit trading budget and should be returned to the sources from whom they were taken. (AGPC)

Response: IDEM agrees that some unallocated allowances should be redistributed to large affected units. However, other commenters have suggested that the EE/RE set-aside should be larger. IDEM is proposing to redistribute fifty percent (50%) of the unallocated allowances to large affected units and retain fifty percent (50%) for the next year's allocation.

Comment: The inclusion of an EE/RE set-aside is supported. This will provide an incentive for sources to go beyond environmental compliance while improving the reliability of the regional electric system. (EC)

Response: IDEM agrees and appreciates the support.

Comment: IDEM should not include non-NO_x or renewable energy units in the set-aside for legal and policy reasons. (CIN)

Response: As part of the SIP call, U.S. EPA provided states with the flexibility to achieve NO_x reductions by various means. U.S. EPA has provided guidance for incorporating EE/RE set-asides in a trading program and include a variety of eligible projects including non-NO_x and renewable energy projects.

Comment: If IDEM makes significant changes to the set-aside, supporting information as to the environmental, emission reduction, energy and cost-effectiveness in dollars per ton of NO_x reduced must be provided. IDEM should provide supporting documentation under statutory financial impact requirements so the relative impact of traditional controls to the benefits that EE/RE projects provide in the time frame between now and 2004 can be analyzed. (CIN)

Response: IDEM has not made significant changes to the size of the set-aside, but has made changes to the distribution process. The changes that IDEM is proposing further clarify the projects that would be eligible for EE/RE set-aside allowances and the manner in which they will be allocated. As to costs, the EE/RE set-aside is established from the large affected unit budget, not the electricity generating unit budget, and IDEM has looked at the financial impacts on these sources.

Comment: IDEM should provide any references or protocols that may be used to develop thresholds. Any terms that are used that are not generally known or used in the industry must be included. In addition, IDEM should consider coal-bed methane related projects as acceptable projects under the EE/RE set-aside and should have consistent thresholds throughout the rule. Any thresholds in the definition should be consistent with any thresholds that would be included in the allocation methodology in 326 IAC 10-4-9. (CIN)

Response: IDEM developed the thresholds referred to in cooperation with the Indiana Department of Commerce, Energy Policy Division. Efficiency thresholds and definitions were based upon references from the U.S. Department of Energy (DOE) including the Energy Information Administration (EIA), Office of Fossil Energy (FE), National Energy Technology Laboratory (NETL), and Energy Efficiency and Renewable Energy Network (EREN). Performance summaries about state-of-the-art baseload power plants that are expected to be commercially offered by 2002 have been prepared by Parsons Infrastructure & Technology for the U.S. DOE, Fossil Energy in the report, "Clean Coal Technology Evaluation Guide." Other reference sources include the U.S. Environmental Protection Agency (EPA), the Indiana State Utility Forecasting Group, and industry associations. Coal-methane projects are not

considered acceptable under the EE/RE set-aside because the projects would result in new NO_x and carbon dioxide emissions. IDEM has included thresholds that are for the most part consistent. There are some differences between the energy efficiency definition and other areas of the rule. In some cases, to be considered as an energy efficiency project, a higher efficiency may have to be obtained. The bar may not need to be as high for existing or new units when allocating allowances under 326 IAC 10-4-9.

Comment: IDEM should clarify how allowances would be allocated for EE/RE projects that would involve kilowatts energy savings whether a utility has an a priori ownership interest in the allowances. (CIN)

Response: The rule language would allow a utility to request allowances for a utility sponsored energy savings project. However, the allocation would be "discounted" to recognize the benefit for the utility for reduced demand.

Comment: IDEM should consider the capture and use of process waste gases as EE/RE projects. Currently basic oxygen furnace gas is flared, but studies have been conducted to evaluate if this could be captured and used to produce useful energy. Economic incentives help justify these projects. (III)

Response: Changes have been included in the definitions and the allocation methodology that would allow a source to request allowances based on energy savings and NO_x reductions.

Comment: The size of the EE/RE set-aside should be increased to five percent (5%) to increase the environmental and economic benefits of the program for Indiana. IDEM should evaluate a larger set-aside and its impacts on the trading budget. (HEC) (CACI) (NRDC) (SDC) (STV) (SCHC) (VWI)

Comment: IDEM should increase the EE/RE set-aside to ten percent (10%). A ten percent (10%) set-aside would be a positive step toward a clean environment and a promising future for our children. (JDS)

Response: IDEM believes that the current size of the EE/RE set-aside is sufficient for Indiana given the projections of potential EE/RE projects. The language has been revised that would allow the set-aside to increase from one (1) year to the next, if unallocated allowances are available.

Comment: A significant concern with the set-aside is that it be used to encourage the most environmentally friendly and most efficient technologies and practices. Therefore, we believe that the allocations from the set-aside should be prioritized and the most desirable projects are the renewable energy and demand-side projects. The distribution of the EE/RE set-aside for the first three (3) year of the program should be prioritized as follows:

1) Renewable and demand-side energy efficiency projects
2) Combined heat and power projects and fuel cells for the substantial use of a single end user.
3) If included, microturbines and small combined cycle generation for the substantial us of a

single end user.
4) Methane-fueled generation.
5) Repowering projects.
6) In-plant efficiency improvements at existing sources.
After three (3) years, the supply-side projects (repowering and in-plant efficiency) should become ineligible for allocations. These projects are the easiest to implement and can take advantage of the set-aside while the other projects ramp up their implementation. (HEC) (CACI) (NRDC) (SDC) (STV) (SCHC) (VWI)

Comment: The language under 326 IAC 10-4-9(e) needs to be clarified to give priority to demand-side energy efficiency and renewable energy projects before supply-side projects. The current language is also unclear on whether the set-aside is made whole for each ozone control period. (EC)

Response: The rule language has been revised to a tiered allocation method that would prioritize the allocations in a manner that is very similar to what is proposed. Demand-side efficiency and renewable energy projects are given first priority. In later years, the prioritization would effectively phase out allocation to supply-side projects when higher priority projects deplete the set-aside. Each year a new set of allowances is available and this is reflected by the language that refers to "The department shall establish . . . for each ozone control period . . .".

Comment: IDEM should include efficiency thresholds for projects to be eligible for allowances. For combined heat and power projects, the threshold should be established at seventy percent (70%). For fuel cells, the threshold should start at forty percent (40%) and then increase to fifty percent (50%) after five (5) years. (HEC) (CACI) (NRDC) (SDC) (STV) (SCHC) (VWI)

Response: IDEM is attempting to provide an incentive for widely available technologies that are currently uncommon in Indiana. The efficiencies for combined heat and power are highly dependent on the availability of processes to use the heat from the equipment. IDEM wishes to create incentives for projects that are efficient, even if they do not achieve the optimum efficiency.

Comment: The definition of "hydropower" should be clarified. The following should be included: "For the purposes of this rule, hydropower is defined only as new hydropower generation projects implemented at existing dam sites." (HEC) (CACI) (NRDC) (SDC) (STV) (SCHC) (VWI)

Response: IDEM has provided the clarification.

Comment: The current definition of EE/RE projects is very broad and encompasses many types of projects that are not traditionally thought of as energy efficiency projects. IDEM should include the following: "this definition is for the purposes of implementing this rule only and may not conform to other definitions of renewable energy and energy efficiency outside of this rule." (HEC) (CACI) (NRDC) (SDC) (STV) (SCHC) (VWI)

Response: IDEM has included this language at the end of the definition.

Comment: The underlying principle of the EE/RE set-aside should be to encourage long term displacement of NO_x and multiple other air emissions from the generating sector by end-use energy-efficiency projects, renewable energy, and technologies that are highly efficient or emit minimal air pollutants, or both. Following are specific comments concerning the set-aside:

- Inefficient and polluting technologies should not be included in the EE/RE definition.
- Repowering existing electricity generating units should not be included in the definition. This over-rewards utilities and threatens to consume a significant portion of the set-aside.
- Improvements to existing electricity generating units should not be included. There is already an adequate incentive to improve efficiency to maximize the allowances the utilities will receive.
- Technologies that rely on wastes for fuel should not be included in the definition. These technologies emit NO_x and are not renewable energy sources. (HEC) (CACI) (NRDC) (SDC) (STV) (SCHC) (VWI)

Response: The technologies that are included are inherently clean or the thresholds are high enough to require new technologies. Repowering projects are only given fractional allowances and the prioritization would not allow these projects to consume a significant portion of the set-aside. The maximization of allowances for improvements to existing units only works for the initial allocation and are limited. Due to the improvements the heat input for allocations in future years will be less. The technologies that rely on waste for fuel already produce NO_x. The fuel is simply being flared or, where the fuel is not flared, the fuel is being vented as methane. IDEM believes it is environmentally beneficial to capture the energy and displace other electricity generation. IDEM has revised the definition so that these technologies are no longer defined as renewable energy sources.

Comment: Indiana may include set-asides for new units and EE/RE projects, but the rule language must be clear that these set-asides are reserved from the trading budget. (USEPA)

Response: IDEM has clarified that the set-aside allowances come from the trading budget.

<u>New unit set-aside</u>

The comments summarized below reflect a wide variety of views on how new sources should be treated in the NO_x budget program. Since the object of the allocation methodology is to distribute a fixed number of NO_x allowances, whether a source is large or small, existing or planned, peaking or baseload influences the position it takes on how to structure this part of the rule. Existing sources' desire for relatively long allocation periods (i.e. greater certainty of how many allowances they will have into the future) is in direct conflict with new sources' desire to become "part of the system" as quickly as possible so that they can receive allocations on an equal footing with existing sources.

With careful consideration of the many valid points that have been raised by affected sources

and the public during this rulemaking process, IDEM has tried to develop as balanced an approach as possible and has used the following two primary principles in developing the rule language it intends to ask the Air Board to final adopt:

- the rule should be as cost effective as possible (the costs to power consumers as well as to the companies themselves), keeping in mind that costs are very difficult to estimate except with a large range of uncertainty;
- the rule should encourage, or at least not discourage, development of an adequate, affordable and clean energy supply in Indiana.

The comments are grouped and summarized according to the specific point they raise. These are: the size of the new source set aside and the length of the allocation period; the formula by which new sources should get their allowances; when does a new source become an existing source for purposes of allocations; what should happen with unused allowances; should there be separate set asides for new EGUs and new nonEGUs or should they be combined; and the timing of when the new source allocations are awarded.

Comment: There is concern about the length of time a new unit must get allowances from the set-aside and possible oversubscription of the set-aside. IDEM should try to supplement the pool or lessen the time that it takes to transition to an existing unit. Using unused EE/RE allowances to supplement the new unit set-aside is supported. IDEM could also extend the five percent (5%) through 2009. (EPI) (EC)

Comment: IDEM should extend the five percent (5%) set-aside to the second allocation period, through 2009, to address the possibility of a large number of new sources locating in Indiana and uncertainty about with which of these projects may actually become operational. (HE)

Comment: The rule should be revised to include a more frequent allocation. Including a three (3) year allocation, three (3) years in advance results in a significant number of units vying for allocations. (EC) (TI)

Comment: The new unit set-aside should not be changed and left at five percent (5%) initially and then reduced to two percent (2%). If any changes are made, it should be to reduce the set-aside to three percent (3%) initially. While there may be projects that have submitted permit applications, this does not mean that all will be built and U.S. EPA's assumptions and analysis showed that the current amount in the rule is sufficient. In addition, allowance allocations also must cover growth at existing units and to avoid the strain on electric reliability, a smaller set-aside should be created. Changes to the size of the new unit set-aside, along with other possible rule changes, could result in the requirement to install additional control devices at a significant cost. These costs are significantly higher for existing sources, as much as forty to fifty percent (40-50%) higher than new sources. (CIN) (AEP) (IEUWG) (STE)

Comment: The new unit set-aside should not be changed and should reflect historical NO_x increases from these units. (III)

Comment: IKEC continues to object to any enlargement of the set-asides that requires controls beyond that envisioned for the SIP call. This would apply to any possible revisions that would

extend the initial five percent (5%) set-aside to the second allocation period. IDEM has already included language that would allow unused allowances to be carried over and this effectively shifts a larger amount to later years. (IKEC)

Comment: The one percent (1%) set-aside for large affected units is supported. (CTE)

Comment: IEUWG has commented previously that if IDEM adopts an allocation period longer than two (2) years, the new unit set-aside should adopt a methodology to incorporate new sources into the allocation system before allowances are re-allocated. Once a unit has been operating for two (2) ozone control periods, the unit should receive a "fixed" allocation based on the highest heat input of the control periods. The allowances would be "retired" from the set-aside, and if the unit emits less than its allocation, any unused allowances are not returned to the set-aside. This approach integrates the new units into the allocation system more quickly and provides more certainty to units that are lower in line for allocations. Draft rule language has been previously provided. (IEUWG)

Response: The length of the allocation period and the size of the new source set aside are integrally related. If IDEM allocates allowances annually, then new sources become part of the regular allocation process relatively quickly, and a smaller new source set aside is required. If IDEM allocates allowances for a three (3) or a five (5) year period, then a larger set aside is needed if the rule is to provide future EGUs with access to any allocations. Existing sources are guaranteed a substantial percentage of the allowances they will need through the allocation process. New sources, on the other hand, will have to rely heavily on the availability of allowances in the market. The smaller the new source set aside, the more new sources will have to obtain allowances from the market.

Existing sources have argued strongly against an annual allocation period because they prefer the certainty of knowing how many allowances they will have for more than a year at a time. Given the long lead time for planning and implementing pollution control projects, having that kind of certainty makes sense. Some have advocated a five (5) year period, longer than the three (3) years proposed by the board. New sources, on the other hand, argue that once they have started operating, they should become existing sources and share in the pool of allowances on an equal footing with sources that have been in existence for many years. Under a three (3) year approach, a source that is new in 2003 will have to use allowances from the new unit set-aside for seven (7) years. On its face, this is a long period of time for new sources to wait to become part of Indiana's existing utility pool.

IDEM believes that a three (3) year period is an appropriate compromise between new and existing sources on this point. Providing adequate lead time and relatively more certainty for sources that still provide the great majority of power to Indiana consumers will contribute to keeping electricity costs low. However, given the lengthy waiting period for new sources that results from this approach, IDEM also believes it is appropriate to provide a five percent (5%) new source set aside for the first six (6) years of the program. IDEM will recommend to the board that any unallocated allowances in the new source set-aside will go first to the EE/RE set-aside if that set-aside is oversubscribed or, the more likely event, be distributed to existing sources.

Comment: IDEM should include a limit on the number of allowances a source may request for a new unit. The rule bases the allocation on the maximum design heat input and an emission rate. Without limits, a unit may be allocated allowances that exceed limitations in the unit's permit. (HE)

Comment: The allocation of the new unit set-aside should be revised to eliminate allocations based on maximum design heat input. This methodology overallocates allowances to peaking units and penalizes baseload units. The language should be revised to allocate allowances at twenty-five percent (25%) of the design heat input for peaking units and seventy-five percent (75%) for baseload units. Another option would be to reallocate at the end of the season based on actual utilization. In any case, allowances should not be banked if a unit does not receive enough allowances to cover actual emissions. The allocation methodology should also be revised to reward more efficient generation. This can be done in the same manner as proposed for existing units, in that, energy efficient generation would be allocated at a 0.15 lb/mmBtu basis rather than the permitted limit. (NS) (EC) (EPI) (TI)

Response: Assigning allowances to new sources is more complicated than existing sources because they have either no or limited historical heat input by which to judge expected usage. The proposed rule provides that the source estimate the number of hours it expects to operate, given the type of facility it is and any limits imposed by the source's permit. Because sources would likely make conservative estimates, the proposed rule provides that any unused allowances would be returned to the new source pool rather than retained (or sold or traded) by the source. IDEM is especially conscious of this issue because of how many of the units recently permitted or currently in the permitting process are for peaking plants, whose operation will vary depending on the severity of the summer. The proposed rule also bases allocations on the emission rate of the sources' permit if it is stricter than 0.15 lb/mmBtu. Since new sources' permitted rates will in virtually all cases be less than 0.15 lb/mmBtu, basing allowances on a higher emission rate simply gives them excess allowances, and makes fewer available to sources who will incur costs to control emissions to the 0.15 lb/mmBtu level.

Upon further consideration of suggestions by several commenters, IDEM believes it is sound policy to treat peaking and baseload units differently and that a fair distribution would be to give the peaking units allowances assuming twenty-five percent (25%) of the maximum heat input and the baseload units allowances based on seventy-five percent (75%) of the maximum heat input. This allows the rule to recognize that baseload units are very likely to operate more hours than peaking units, even if it is a hot summer.

By continuing to base the allowances on lower of permitted emission rate or 0.15 lb/mmBtu, the rule assures that new sources will not get allowances for more emissions than their permit allows. By continuing to require that unused allowances be returned to the pool, the rule also guarantees that sources will not get more allowances than they actually need.

Comment: The current rule would allow a new unit to be considered "existing" after one (1) year of operation. While this may help transition units into the existing unit allocation pool

sooner, it could result in an underestimation of allowances. New units should be given the option of remaining in the new unit set-aside for a longer period of time to get representative data for allowance allocation. (HE) (WE)

Comment: A new unit should be considered to be "existing" after one (1) year of operation and the rule revised accordingly. (EC) (TI) (EPI)

Response: In order not to further exacerbate how long it takes new sources to get into the existing source pool, the proposed rule provides that a new source can be considered existing after one year of operation. Sources have raised the concern that, if that one year had lower than expected operation, three years of allowance allocations would be based on that unreasonably low number. These sources would like the option to remain in the new source pool.

Comment: IDEM has proposed to bank unused allowances in the new unit set-aside for use in future years. While this is supported, there should be limitations on the amount that may be banked so that the possibility of triggering flow control is reduced. A cap of two percent (2%) of the trading budget would be adequate for new units without unnecessarily withholding allowances from the market. (HE)

Comment: IEUWG has agreed that because units are allocated allowances based on the maximum design heat input, these units should return unused allowances at the end of the ozone control period. However, instead of banking these allowances, we believe that these allowances should be redistributed to new units that did not receive allowances. While this would require an expedited "true up" at the end of the ozone control period, it more accurately reflects the true purpose of the set-aside, ensuring that new units have sufficient allowances until they are integrated into the program. Recommended language has been provided and would appreciate an explanation of why is has not been adopted. (IEUWG) (STE)

Response: IDEM acknowledges the point made by this comment, and proposes to address it by recommending that the rule differentiate peaking and baseload units in the initial allocation process rather than by trying to return unused allowances to other new sources who may not have received enough in the initial allocation. Given the very compressed time for true up at the end of the ozone season, trying to accomplish this distribution could be unrealistic. Moreover, IDEM expects that by the time this distribution could be made, new sources would have already secured the allowances necessary for that ozone season, in which case the additional allowances would more probably be carried over for use in the next season.

Comment: IDEM should not combine the EGU and nonEGU new unit set asides. U.S. EPA created separate budgets based on different source types and control requirements and it makes little sense to combine them for the purposes of the set-asides. This could lead to one group subsidizing another. (IEUWG) (STE)

Response: IDEM agrees that the better approach is for the rule to maintain separate new source set asides for EGUs and nonEGUs so that neither group subsidizes the other and will recommend appropriate language changes to the board.

Comment: IDEM should revise the rule to issue new unit set-aside allocations as early as possible to assist in planning. As written, it would be very risky for a new unit to come on-line and rely on the new unit set-aside allocations from year to year. IDEM should encourage the replacement of old units with new, clean units. (III)

Comment: IDEM should not allocate allowances to new units on a pro rata basis. The allocations should be done on a first-come, first-served basis, based on the date that the new unit is issued a construction permit. This approach minimizes uncertainty and is also the most fair, as those units that get permits first likely have made the earliest initial investment. Under the proposed approach, sources will not know how many allowances the unit will receive until shortly before the ozone control period and this could impact the ability to obtain financing for the project. (IEUWG) (STE)

Response: The issue of whether new source allocations are made on a rolling basis or at a given time during the year is a clear policy question. Advantages to a rolling allocation system are that sources get certainty earlier in the process about the availability of allowances, which helps in planning and financing, and sources that are further ahead in the permitting process get the reward of access to allowances before other projects that are not as far along. On the other hand, how quickly a source gets through the various necessary permitting and approval processes does not only depend only on its own diligence—factors beyond its control may affect the timing of approvals. Moreover, to give out the new source set aside on a rolling basis could result in one (or a few) sources securing all the new source allowances for that year, with none left for projects that just weren't quick enough. IDEM believes a fairer outcome is to review the applications for new source allowances once a year and share them pro rata among all eligible projects, thus assuring that all projects get some allowances, even if none gets all that it needs.

Monitoring

Comment: There are several issues concerning the monitoring requirements:

- Operation of the CEMs should not be required for units that are not operating.
- CEMs should not be required for units that are not operating as of May 31, 2004. Some units may be down temporarily.
- CEMs certification should not be required each year for units that monitor only during the ozone control period. (III)

Response: CEMs operation is not required for units not operating. This is reflected in the change to the definition of "percent monitor data availability" that is based on the number of hours the unit operated. Recertification is not needed unless there have been modifications or other changes that are specified in the rule. Owners or operators do have to do an annual quality assurance testing according to 40 CFR 75.74(c) prior to commencement of the control period.

Comment: The language under 326 IAC 10-4-12 should be changed to require monitoring to be in place by May 31, 2003. The additional year of monitoring ensures that sources' monitoring systems are working and meeting the requirements of 40 CFR 75 before the requirement to hold

allowances begins in 2004. (USEPA)

Response: IDEM has changed the dates that the monitoring must be in place.

Early Reduction Credits

Comment: The number of allowances currently available for distribution as early reduction credits is substantially smaller than the number of credits that could be generated by sources if they had adequate incentives to install and operate controls before 2004. IDEM should continue to seek all reasonable mechanisms to increase flexibility to meet the goals of the SIP call to avoid unnecessary cost increases and risks to electric reliability. (CIN)

Comment: IEUWG has previously commented that U.S. EPA underestimated the number of control devices that would be required to comply with the SIP call and to remedy this situation, IDEM should double the size of the compliance supplement pool. As an alternative, we have proposed the approach taken by Ohio that would allocate allowances for the period May 1 to May 31, 2004. IDEM has not accepted these recommendations because of concerns that U.S. EPA will not approve the SIP submission. There is a new administration in office and IDEM should obtain a direct answer from the political leadership at U.S. EPA before deciding whether or not to abandon these approaches. (IEUWG)

Response: U.S. EPA has stated clearly, both in response to Commissioner Kaplan's recent letter and in response to draft and proposed rules submitted by other states, that it will not approve state rules that contain larger compliance set aside pools than that contained in the NO_x SIP Call or that use the approach proposed by Ohio of adding the May 2004 uncontrolled emissions to the state's budget. IDEM has had numerous phone calls with U.S. EPA staff on these two suggestions and, most recently, clear direction from John Seitz, the Director of U.S. EPA's Office of Air Quality Planning and Standards on these points. The new administration has not given any indication that it intends to reconsider the agency's position on these issues. It is not in the interest of Indiana citizens or business for IDEM to submit a rule to U.S. EPA that we know will not be approved, therefore IDEM does not intend to ask the board to add these provisions to the rule. If U.S. EPA were to take a different position on either of these issues in the future, amendments to the rule could be considered at that time.

Penalties

Comment: The rule should not require that each day of the ozone control period is a separate violation if a unit has excess emissions. Only the number of days in which the allocations were exceeded should be violations. IDEM should not put the onus on the owners and operators to demonstrate that a lesser number of days should be considered and should define exactly what constitutes a "lesser number of days." (III)

Comment: The rule must include language in 40 CFR 96.54(d)(3)(i) concerning penalties. The language stipulates the maximum number of days in which a violation could be sought. Individual agencies have the discretion to seek penalties for fewer days of violation. Removing

this language would limit both the state's and U.S. EPA's ability to seek violation for the maximum number of days, which would be contrary to the Clean Air Act, as interpreted in case law. (USEPA)

Response: IDEM agrees with the commenters that the notion of daily noncompliance in the context of a budget-based rule is questionable. However, IDEM has not changed the language concerning violations because U.S. EPA has indicated that it cannot approve language less stringent than the federal language. The language does allow a demonstration that fewer days should be considered and IDEM would be inclined to use its enforcement discretion to accept such a demonstration. IDEM believes that it is up to the owner or operator to make this demonstration if they do not believe the unit was out of compliance for each day.

Multi-pollutant compliance strategy

Comment: IDEM is encouraged to include language that would allow compliance extensions for units that commit to a multi-pollutant control strategy. Detailed comments and suggested language have been provided during the Second Notice of Comment Period. We believe that Indiana statutes and the Clean Air Act allow the state to include these provisions in the rule in a new section 16. Our proposal would allow sources an extension until 2008 and include an expanded compliance supplement pool or a innovative technology pool for use by units under an approved plan. This program would not conflict with the intent of the NO_x SIP call or U.S. EPA's ability to evaluate the impact of the emission reductions. (AEP) (IEUWG)

Response: As with expansion of the compliance supplement pool, U.S. EPA has been consistent in its position that the requested language will not be approvable. As noted above, future changes in U.S. EPA policy would have to be considered and could lead to amendments to Indiana's rule.

Direct compliance extensions

Comment: IEUWG has previously commented about the showing that would be required for a direct compliance extension and the manner in which IDEM had structured the rule language to partition the compliance supplement pool for these extensions. While IDEM has revised the rule to remove the partitioning language, the language concerning the showing has not changed. As has been previously stated, the showing is almost impossible to make and IDEM should consider modifying the language to lessen the stringency in light of what has happened in California. (IEUWG)

Response: Any changes would have to be acceptable to U.S. EPA. It should be noted that utilities are not the only units subject to this rule. Large affected units may need a direct compliance extension if controls are not in place by the compliance date. In addition, IDEM expects that many sources will pursue early reductions credits to provide for compliance extensions and this may eliminate the need for direct extensions.